

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. 2:02-cr-0416 GEB JFM (HC)

vs.

DAWANE ARTHUR MALLET,

Movant.

ORDER

Movant is a federal prisoner proceeding pro se with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Movant challenges his 2003 conviction on multiple federal criminal charges and the sentence imposed thereon. On June 16, 2008, respondent moved to dismiss the motion as barred by the statute of limitations contained in 28 U.S.C. § 2255.¹ On June 18, 2008, the Clerk of the Court issued a notice setting a briefing schedule for respondent's motion in accordance with the provisions of Local Rule 78-230(m). Pursuant to that notice movant's opposition to respondent's motion was due on July 9, 2008.

¹ On June 18, 2008, the Clerk of the Court issued a notice setting a briefing schedule for respondent's motion in accordance with the provisions of Local Rule 78-230(m). Pursuant to that notice, movant's opposition to respondent's motion was due on July 9, 2008. Movant has not filed an opposition to the motion or otherwise responded either to the motion or to the notice setting the briefing schedule.

1 Movant did not file an opposition to the motion or otherwise respond either to the motion or to
2 the notice setting the briefing schedule.

3 On July 30, 2008, this court issued findings and recommendations finding that the
4 § 2255 motion had been filed after expiration of the relevant limitation period and recommending
5 that respondent's motion to dismiss be granted. In relevant part, the court found that movant's
6 direct appeal was denied on December 1, 2006 and that the limitation period began to run ninety
7 days thereafter. Findings and Recommendations, filed July 30, 2008, at 2. In a footnote in the
8 findings and recommendations, the court noted that

9 It is unclear from the record whether movant, who was represented
10 by counsel on direct appeal, knew of the disposition of his appeal
11 prior to the time he filed his § 2255 motion. In his motion, movant
12 alleges that his appeal is "still pending". § 2255 Motion, filed
13 April 3, 2008, at 2. In addition, movant's fourth claim for relief is
14 a claim of ineffective assistance of appellate counsel in which
15 movant alleges, inter alia, that his appellate counsel failed to keep
16 him aware of the status of his direct appeal. Id. at 5. However,
17 movant has not opposed respondent's motion and therefore has
18 not relied on these or any other allegations to contend that the
19 action is not time-barred.

20 Id. at 2 n.3.

21 On August 11, 2008, movant filed objections to the findings and
22 recommendations. In the objections, movant states, inter alia, that his attorney never informed
23 him of the status or outcome of his direct appeal. Good cause appearing, the court will vacate the
24 findings and recommendations and treat movant's objections as an opposition to respondent's
25 motion to dismiss. Respondent will be granted a period of ten days in which to file a response to
26 movant's opposition.

In accordance with the above, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed July 30, 2008 are vacated;
2. Movant's August 11, 2008 objections will be treated as an opposition to
respondent's motion to dismiss; and

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1 3. Respondent is granted ten days from the day of this order to file a response to
2 movant's opposition.

3 DATED: November 3, 2008.

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6 UNITED STATES MAGISTRATE JUDGE

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